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Colorado General Assembly

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MEMORANDUM

TO: Mary Henry and Andrew O'Connor

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: July 17, 2017

SUBJECT: Proposed initiative measure 2017-2018 #38 concerning severance taxes on oil and gas

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

An earlier version of this proposed initiative, proposed initiative 2017-2018 #20, was the subject of a memorandum dated April 5, 2017. Proposed initiative 2017-2018 #20 was discussed at a public meeting on April 7, 2017. The substantive and technical comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meeting, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

The major purposes of the proposed amendment to the Colorado Revised Statutes appear to be:

1. To retroactively raise the oil and gas severance tax rates by 5% for tax years that begin on and after January 1, 2000, but prior to January 1, 2018;
2. For tax years that begin on and after January 1, 2018, to make the following changes to the oil and gas severance tax:
 - a. Exempt gross income that is less than \$300,000 from the tax;
 - b. For gross income that is \$300,000 and over, increase the tax rate from 5% to 10%;
 - c. Halve the production amounts that qualify for the stripper well exemption; and
 - d. Eliminate the credit allowed against the severance tax for property taxes paid; and
3. To modify the allocation of the oil and gas severance tax and require a portion of the revenues to be used for public school funding, including all-day kindergarten, and for a new program that provides medical care and treatment for people suffering negative health impacts caused by oil and gas production in those communities impacted by oil and gas production.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. In the legislative declaration, it states that the intent is to "supplement, rather than supplant, current appropriations" for the listed purposes. How are current appropriations defined? Are current appropriations a specific fiscal year, and, if so, which fiscal year?
2. How does the measure insure that the funding from the additional severance tax revenue supplements the listed purposes?
3. The legislative declaration states that it is your intent to not adversely impact the programs currently funded with severance tax revenue. How is this measured? If oil and gas production declines, is the state responsible for

making additional appropriations to the programs currently funded with severance tax revenue?

4. Currently, the last section, 39-29-105 (1)(b), C.R.S., reads as follows: "The tax for oil and gas shall be at the following rates of the gross income:

Under \$25,000	2%
\$25,000 and under \$100,000	3%
\$100,000 and under \$300,000	4%
\$300,000 and over	5%"

It is standard drafting practice to use stricken type to show language being removed the Colorado Revised Statutes. But instead of employing stricken type, the initiative increases each of the respective percentages by 5%. Do you intend to increase the rate by 5% for each of the income levels by 5%? If so, it would be helpful to show the existing rates in stricken type followed by the new rate (For example, "~~2%~~ 7%"). If the rate changes were inadvertent and you are only trying to prospectively change the severance tax, then the existing rates would be included without any changes, and the only legal effect of the change subsection (1)(b) would be to put an end date on the current tax.

5. If you intend to change the rates in section 39-29-105 (1)(b), C.R.S., then the following questions apply:
- Under the plain language of the amended provision, the increased rates apply for tax years that begin from 2000 to 2017. Is that your intent?
 - If you did not intend to retroactively change the rates for all of the years identified, for what tax years do the increased rates apply? A change to the language is necessary to clarify this intent.
 - If an oil and gas producer has previously paid taxes for tax years 2000 through 2017, will the producers be required to recalculate the tax and pay these additional taxes in 2018 after the measure passes?
 - Will oil and gas producers be subject to penalties and interest on the additional taxes owed for past years?
 - How will the Department of Revenue collect taxes on oil and gas producers that have gone out of business or have merged with other companies?

- f. What happens if an oil and gas producer no longer has records for past years? How would they recalculate the tax owed under the new rates?
 - g. Will the revenue collected for past years be subject to the fiscal year spending limit?
 - h. Do you intend for the retroactive taxes to be distributed according to the current law formula of 50% to the Department of Natural Resources and 50% to the Department of Local Affairs?
 - i. Are you aware of any tax rate in Colorado or any other state that was retroactively increased after the taxes have been paid for the past year?
 - j. Do the retroactive taxes in this measure create a new obligation for the past severance of oil and gas? Does this obligation violate the prohibition on retrospective legislation set forth in section 11 of article II of the state constitution?
6. The following questions relate to the existing severance tax on oil and gas in section 39-29-105 (1)(c):
- k. Starting in 2018, does the initiative raise the severance tax rates on gross income of \$300,000 and over from 5% to 10%, and exempt gross income that is less than \$300,000?
 - l. If voters approve the measure in November 2018, then this would change the rate for tax years commencing during 2018. Prior to the election, a corporation will pay estimated taxes under the current law in section 39-22-626. Could a taxpayer be subject to penalties for failing to pay estimated taxes based on the increased tax liability due to the higher tax rate?
 - m. If the initiated law becomes effective after January 1, 2018, then would the change be retroactively changing the taxes for taxpayers whose tax year begins on January 1, 2017? Would this be considered retrospective legislation under section 11 of article II of the state constitution?
 - n. Under section 39-29-111 (1), C.R.S., a producer is required to withhold 1% of an interest owners' gross income. Will withholding that amount be sufficient for the tax in subsection (1)(c)?
7. In section 39-29-108 (2.3), is the phrase "paid by operating of" supposed to be "paid by operation of"?

8. The measure distributes 30% of the revenue into operational account "for the exclusive purpose of establishing all day kindergarten in Colorado public schools." If the additional severance tax revenue is not sufficient for all-day kindergarten in Colorado public schools, is the legislature obligated to use other money for all-day kindergarten?
9. The measure uses the "existing method for funding public schools" to determine how the additional severance tax revenue for public education is distributed.
 - o. Because the existing method does not provide for all-day kindergarten, how can money be used to provide all-day kindergarten in Colorado public schools?
 - p. How is the additional severance tax revenue distributed if the existing school finance formula changes?
10. The measure dedicates 60% of the revenue into the operational account to the "Department of Public Health for the exclusive purpose of medical care and treatment" for the negative health impacts proximately caused by oil and gas production.
 - q. Do you mean the Department of Public Health and Environment?
 - r. Who determines what is a negative health impact proximately caused by oil and gas production?
 - s. Is anyone in the state of Colorado eligible for additional funding for healthcare of the listed conditions or is there proof required that the condition is proximately caused by oil and gas production?
 - t. Is anyone outside of the state of Colorado eligible for healthcare funding for the conditions listed in the measure?
 - u. Does oil and gas production also include the collecting, gathering, processing, and transportation of oil and gas?
11. The clean energy fund created in section 24-75-1201 has been repealed, and money cannot be deposited into a repealed cash fund. It is unclear what will happen to the 10% that you have identified to be allocated to this fund, but in the absence of a change to the initiative, it appears that the statutory distribution fails to include the "renewable and clean energy projects" identified in the legislative declaration.

12. Section 24-75-1201 was repealed in 2013, and, therefore, it is unclear what you intend to do in section 6 of the initiative. (A potential successor fund was identified in the April 5, 2017, memorandum.)
13. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the legislative council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.
 - v. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
 - w. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?
 - x. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the legislative council staff at BallotImpactEstimates.ga@state.co.us.

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. The following words are misspelled: "addition" (page 1), "provisions" (page 2), "establishing" (page 5).
2. The phrase "all day kindergarten" should be hyphenated as "all-day kindergarten."